QUESTION PRESENTED

Whether a dispute concerning a federal agency's compliance with non-discretionary requirements of OMB Circular A-76, a government-wide directive concerning contracting-out of services, may be resolved through the grievance arbitration process set forth in Title VII of the Civil Service Reform Act of 1978.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2123

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY

and

NATIONAL TREASURY EMPLOYEES UNION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NATIONAL TREASURY EMPLOYEES UNION

OPINIONS BELOW

The decision of the Federal Labor Relations Authority (Appendix to petition for writ of certiorari) (Pet. App. 10a-18a) is reported at 27 F.L.R.A. 976. The decision of the Court of Appeals (Pet. App. 1a-9a) is reported at 862 F.2d 880.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1988. Pet. App. 19a-20a. A petition for rehearing was denied on February 28, 1989. Pet. App. 21a.

On May 22, 1989, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 28, 1989. The petition for a writ of certiorari was filed on that date, and was granted on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case requires consideration of the following statutory provisions, the relevant portions of which are set forth in the appendix to this brief: 5 U.S.C. §§ 7103(a)(9) and (14), 7106, 7117(a), and 7121(a)-(c).

STATEMENT

A. The federal labor-management relations scheme

1. *Introduction*

This case involves the collective bargaining and dispute resolution provisions of Title VII of the Civil Service Reform Act of 1978, Pub. L. 95-459, 92 Stat. 1111, 5 U.S.C. § 7101 *et seq.* (CSRA or the Statute). Title VII of the CSRA is the first codification of labor relations in the federal service. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 91 (1983).[1] Congress explicitly found that "the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them . . . safeguards the public interest, . . . contributes to the effective conduct of public business, . . . and facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment." 5 U.S.C. § 7101(a). It also directed that the Statute's provisions "should be interpreted in a manner consistent with the requirements of an effective and efficient government." *Id.* at § 7101(b).

[1] Prior to the enactment of the CSRA, labor-management relations in the federal service were governed by a program established in 1962 by Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos. 11,616, 11,636, and 11,861, 3 C.F.R. 605, 634, 957 (1971-1975 comp.) The various Executive Orders are reprinted in the *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 96th Cong., 1st Sess. at 1211, 1244, 1268, 1272, 1336, 1341 (Comm. Print 1979).

2. *Collective bargaining under the CSRA*

Under the Statute, agencies are required to bargain in good faith with the elected exclusive representative of employees concerning conditions of employment. 5 U.S.C. §§ 7103(a)(12), 7114(b)(2). The term "conditions of employment" is defined broadly, and includes "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions," but does not extend to policies, practices, and matters relating to political activities or job classification, or to matters "specifically provided for by Federal Statute." 5 U.S.C. § 7103(a)(14).

This broad duty to bargain with respect to conditions of employment is subject to two general exceptions. First, the duty does not extend to proposals which are "inconsistent with any federal law or government-wide rule or regulation" or with agency rules or regulations for which there is a "compelling need." 5 U.S.C. § 7117(a). Second, the Statute contains a management rights provision which reserves certain prerogatives to management, including, most important for purposes of this case, the right "in accordance with applicable laws . . . to make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2)(B). The enumerated management rights, including the right to make determinations with respect to contracting-out, are "subject to subsection (b)" of Section 7106, which provides that an agency must negotiate concerning "procedures" agency managers will ob-

serve in exercising their authority and "appropriate arrangements" for employees who are adversely affected by management's exercise of its rights. 5 U.S.C. §§ 7106(b)(2), (3).

The Federal Labor Relations Authority (FLRA or the Authority) is an independent, three-member body created by the CSRA to perform a role in federal government labor relations similar to the role the National Labor Relations Board performs in the private sector. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. at 97. The Act specifically assigns the FLRA the responsibility to determine whether particular bargaining proposals fall within or without the statutory duty to bargain. 5 U.S.C. § 7105(a)(2)(E).

The CSRA provides a specific administrative procedure for this task, the "negotiability determination," an expedited appeal directly to the FLRA. 5 U.S.C. § 7117(c). In determining the negotiability of a particular proposal, the Authority does not address the merits of the proposal, but only whether it falls within the duty to bargain. *Department of Defense, Army-Air Force Exchange Service v. FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982). FLRA negotiability determinations are directly appealable to the regional courts of appeals. 5 U.S.C. § 7123.

If the FLRA finds a proposal negotiable, the parties are required to bargain in good faith over its inclusion in the collective bargaining agreement. If negotiations reach impasse, "either party may request the Federal Services Impasses Panel to consider the matter" and "take whatever action is necessary and not inconsistent with [chapter 71] to resolve the impasse," including, where appropriate, requiring the parties to include the proposal in the contract. 5 U.S.C. §§ 7119(b)(1), 7119(c)(5)(B)(iii); *National Treasury Employees Union v. FLRA*, 712 F.2d 669, 671 n.5 (D.C. Cir. 1983). When issuing such an order, the FSIP considers the reasonable-

ness of any proposal at issue in determining what contract language will be imposed. *See Veterans Administration Medical Center, Tampa, Florida v. FLRA*, 675 F.2d 260, 265 n.9 (11th Cir. 1982); *see also U.S. Department of Agriculture Tick Eradication Program and Local 3106, American Federation of Government Employees*, 87 FSIP 26 (1987).

3. *The negotiated grievance procedure*

In addition to setting forth the duty to bargain in good faith with respect to conditions of employment, Title VII of the CSRA requires all collective bargaining agreements to include procedures for the settlement of "grievances." 5 U.S.C. § 7121(a). "Grievance" is defined by the Statute to include complaints by "any employee concerning any matter relating to the employment of the employee . . .," complaints regarding the interpretation or breach of a collective bargaining agreement, and complaints concerning any "violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9). Only five subjects are excluded from the grievance procedure (5 U.S.C. § 7121(c)),[2] and that procedure is the exclusive one for resolving all grievances that fall within its coverage, with exceptions not relevant here. 5 U.S.C. § 7121(a)(1).

The Statute mandates that grievances that are not satisfactorily resolved may be submitted to binding arbitration at the election of the agency or the union. 5 U.S.C. § 7121(b)(3)(C). Thereafter, either the union or the agency may file exceptions to the arbitral award with the

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[2] The five excluded areas are grievances concerning (1) prohibited political activities, (2) retirement, life insurance, or health insurance, (3) suspension or removal for "national security" reasons, (4) examination, certification or appointment, and (5) the classification of a position which does not result in a reduction in pay. 5 U.S.C. §§ 7121(c)(1)-(5).

FLRA, which may reverse the award, if, among other things, it finds the award "contrary to any law, rule, or regulation." 5 U.S.C. § 7122(a)(1). There is no judicial review of the FLRA's decisions on review of an arbitral award unless the award involves an unfair labor practice. 5 U.S.C. § 7123(a)(1).

The Statute provides that any subject matter which *could* be grievable under the provisions of the Statute *is* grievable unless the parties expressly agree otherwise. 5 U.S.C. § 7121(a)(2); *see* H.R. Rep. No. 1717, 95th Cong., 2d Sess. 157 (1978) *reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 96th Cong., 1st Sess. 825 (Comm. Print 1979) (*Legislative History*); *American Federation of Government Employees, Locals 225, 1504 and 3723, AFL-CIO v. FLRA*, 712 F.2d 640, 642 (D.C. Cir. 1983). Federal sector unions and agencies nonetheless routinely incorporate statutory and regulatory requirements in their collective bargaining agreements and explicitly acknowledge in the agreement that violations of those requirements are subject to the negotiated grievance and arbitration process. This practice is firmly established and is followed to preclude a later challenge to the arbitrability of a matter. *See Department of Health and Human Services v. FLRA*, 844 F.2d 1057, 1101 n.1 (4th Cir. 1988) (en banc) (Murnaghan, dissenting). Conversely, a party may demand that a matter be expressly excluded from the grievance procedure, even if the law already requires its exclusion, in order to save the "delay and expense" associated with challenging the arbitrability of a grievance when an actual dispute arises. *See Montana Air National Guard v. FLRA*, 730 F.2d 577, 579 (9th Cir. 1984).

The practice of including provisions explicitly covering violations of laws, rules, and regulations under the grievance procedure in federal collective bargaining agreements also serves other important practical interests of the parties.

Supervisors, union representatives, and employees who use the grievance procedure are routinely subject to a confusing array of statutes, government-wide regulations, and internal agency policies and rules. These directives govern virtually every aspect of the employment relationship. A collective bargaining agreement which specifically enumerates the most significant of these standards serves as a single, handy, and self-contained reference for each of the parties concerning their rights and obligations.

4. *The Circular A-76 and its appeal process*

The Office of Management and Budget (OMB) Circular A-76 and its accompanying Supplement are mandatory, government-wide standards for evaluating which is more cost effective: use of in-house employees or use of commercial suppliers. OMB Circular A-76, 44 Fed. Reg. 20,556 (1979), *as amended*, 48 Fed. Reg. 37,110 (1983), 50 Fed. Reg. 32,812 (1985) (Pet. Br. at 1a-11a); Supplement to OMB Circular A-76 (Revised) (August 1983).[3] The Circular A-76 and its Supplement are promulgated by OMB's Office of Procurement Policy, which "provides overall direction of procurement policies" and issues uniform procurement regulations for the entire federal government. 41 U.S.C. §§ 401(b), 405a. The Circular A-76 "establishes federal policy" with regard to contracting-out. The Supplement "implements the policy" by establishing procedures for comparing in-house and contract costs. Circular A-76 Supp., Introduction, Appendix *infra* at 5a.

The general policy underlying the Circular is that the commercial products and services used by the government

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[3] Copies of the current Circular A-76 and Supplement have been lodged with the Clerk of the Court. In addition, the Circular and selected portions of the Supplement are contained in appendices to the Petitioner's Brief and Respondent NTEU's Brief. The entire Supplement is printed in the record of the Court of Appeals as a supplemental appendix.

should be provided by contractors where an outside contract is more economical than in-house performance. Circular A-76, § 5(a), (c), Pet. Br. at 2a. Agencies are not permitted to contract-out "government functions," such as the "discretionary exercise of Government authority" and "monetary transactions" (tax collection and revenue disbursement). *Id.* at § 6(e), Pet. Br. at 3a-4a. If an agency determines that a function is "commercial," rather than "governmental," it is generally required to conduct a "cost comparison," "in accordance with the requirements of this [Circular] and its Supplement," in which an estimate of the cost of government performance is compared to the cost to the government of contract performance. *Id. at* § 6(f), Pet. Br. at 4a. The process of identifying and quantifying various costs is governed by the comprehensive "Cost Comparison Handbook." Circular A-76 Supp., part IV; *See* Appendix, *infra* at 6a. If, upon application of the rules in the Handbook, the agency finds that contract performance is cheaper, the contract is awarded. *Id.* at IV-3, Appendix *infra* at 10a.

The Supplement also specifies its own appeal procedure in order to provide "administrative safeguards" to ensure decisions are "fair and equitable" to "directly affected parties"—defined as "Federal employees and their representative organizations and bidders or offerors on the instant solicitation"—and that the decisions are made in accordance with the procedures in the Supplement. Circular A-76, § 6(g), Pet. Br. at 4a; Circular A-76 Supp., part I, p. I-14, Pet. Br. at 12a. The appeal procedure covers challenges to the accuracy of the cost comparison, or the propriety of an agency decision to contract-out without a cost comparison, but does not cover either disputes between contractors or "government management decisions." *Id.* The Circular states that its provisions "d[o] not authorize an appeal outside the agency or judicial review" and that the "procedure and the decision upon appeal may not be subject to negotiation, arbitration, or agreement." *Id.* at I-15, Pet. Br. at 13a.

B. The proceedings in this case

1. During term negotiations with the IRS in 1986, NTEU offered a variety of proposals concerning contracting-out procedures, including the proposal at issue here, that "[t]he Internal Appeals Procedure [for challenging contracting-out decisions] shall be the parties' grievance and arbitration provisions of the Master Agreement." Pet. App. at 10a. IRS objected that the proposal was not properly within the scope of bargaining and NTEU filed a negotiability appeal with the FLRA pursuant to 5 U.S.C. § 7117. Pet. App. at 10a.

2. The FLRA held that NTEU's proposal is negotiable, relying in large part on its previous decisions in *American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission*, 10 F.L.R.A. 3 (1982), *enforced sub. nom. Equal Employment Opportunity Commission v. FLRA*, 744 F.2d 842 (D.C. Cir. 1984), *cert. dismissed* 476 U.S. 19 (1986) (*EEOC*), and *American Federation of Government Employees, Local 1923 and Department of Health and Human Services, rev'd sub nom. Department of Health and Human Services v. FLRA*, 844 F.2d 1087 (4th Cir. 1988) (en banc) (*HHS*). The Authority concluded that Circular A-76 is a government-wide rule or regulation, and that claimed violations of a rule or regulation are within the statutorily prescribed scope of the grievance procedure. Pet. App. at 13a. It held that agency regulations like Circular A-76 cannot unilaterally limit employees' statutory rights to file grievances over agency decisions which affect conditions of employment, as the Circular purports to do. (Pet. App. at 12a). Finally, the FLRA determined that permitting grievances concerning management's failure to comply with applicable statutes or regulations does not interfere with management's right to contract-out, because it would "only contractually recognize and provide for the enforcement of external limita-

tions on management's right," namely, the external limitations mandated by Circular A-76. Pet. App. at 15a.

3. The agency filed a petition for review in the D.C. Circuit. The panel (with Judge D.H. Ginsburg dissenting) affirmed the Authority's rulings. It recognized that NTEU's proposal is similar to the proposal which was at issue in *EEOC*, and could find no "intellectually legitimate basis to distinguish *EEOC* from this case." Pet. App. at 5a.

In *EEOC v. FLRA*, the D.C. Circuit held negotiable a union proposal that would have permitted disputes concerning an agency's compliance with Circular A-76 to be submitted to grievance/arbitration. It rejected the agency's argument that the proposal violated management rights. The court reasoned that the management rights clause contemplates that management's contracting-out authority must be exercised "in accordance with applicable laws," such as Circular A-76. 5 U.S.C. § 7106(a)(2). Because the union's proposal did not impose any additional substantive criteria governing management's decision, it did not "affect" management's reserved authority to make contracting-out decisions, within the meaning of the Statute; it merely provided a procedure for enforcing existing substantive limitations. *EEOC*, 744 F.2d at 848-851. Further, the Court noted, given the Statute's expansive definition of "grievance", a complaint asserting that a contracting-out decision was not made in accordance with laws, rules, or regulations, including Circular A-76, would be grievable even in the absence of the proposal. *Id.* at 849-851. Finally, the Court rejected EEOC's argument that the language of the Circular itself, stating that its provisions "shall not be construed to create" any right of appeal, rendered the proposal non-negotiable. It observed that the proposal does not "create" a right of appeal because that right was created by the Statute's broad grievance provisions, and that, in any event, "there is no indication in the Act or elsewhere of a congressional

intent to allow agencies to limit by regulation the statutorily defined grievance procedure." *Id.* at 851.[4]

In this case, the panel's decision, affirming on the basis of *EEOC*, was in conflict with the decisions of the Fourth and Ninth Circuits, which had both rejected *EEOC*. *Defense Language Institute v. FLRA*, 844 F.2d 1398 (9th Cir. 1985); *Department of Health and Human Services v. FLRA*, *supra*. Judge D. H. Ginsburg dissented from the court's holding that it was bound by the earlier *EEOC* decision and indicated that he would reverse the FLRA's decision, for the reasons explained in the Fourth Circuit's decision in *HHS*. Pet. App. at 9a. The Agency also filed a petition for rehearing with suggestion for rehearing *en banc*, which was denied. Pet. App. at 23a.

SUMMARY OF ARGUMENT

A. In the Civil Service Reform Act, Congress explicitly found that "labor organizations and collective bargaining are in the public interest." 5 U.S.C. § 7101(a). Contrary to the government's assertions, there is no inconsistency between promotion of the public interest in collective bargaining and the promotion of "effective and efficient" government. Rather, it is the government's arguments that are inconsistent with the Statute, because they undermine

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[4] In *EEOC*, this Court granted the agency's petition for a writ of certiorari, and then dismissed the writ as improvidently granted, because several of the issues which the agency presented to the Court on certiorari had not been raised before the FLRA or the D.C. Circuit. *EEOC*, 476 U.S. at 23; *see* 5 U.S.C. § 7123(c). In particular, the agency sought to argue for the first time in this Court: 1) that Circular A-76 is not an "applicable law" within the meaning of 5 U.S.C. § 7106(a)(2); 2) that the Circular is not a "law, rule, or regulation" within the meaning of Section 7103(a)(9)'s definition of grievance; and 3) that the Circular nonetheless *is* a "government-wide rule or regulation" for purposes of § 7117(a)(1). 476 U.S. at 22. The agency raised these arguments in this case, but neither the FLRA nor the court of appeals believed that the arguments undercut either the rationale or the result of the earlier decisions.

the statutorily prescribed grievance procedure, and create a destructive tension between that procedure and the management rights clause.

The government's argument that the management rights clause precludes arbitral review of all disputes that arise under Circular A-76 is grounded on two erroneous contentions: First, that A-76 is neither a "law, rule, or regulation affecting conditions of employment" whose violation is explicitly subject to the grievance procedure (5 U.S.C. § 7103(a)(9)(C)(ii)), nor an "applicable law" qualifying management's right to make contracting-out determinations. 5 U.S.C. § 7106(a)(2). Second, that arbitral review would interfere with management rights by permitting the arbitrator to substitute his judgment for that of the agency and by interjecting delay and uncertainty in the contracting-out process.

B. Contrary to IRS's contentions, disputes concerning an agency's compliance with the OMB Circular *are* included in the statutorily prescribed grievance procedure because "an allegation that [an agency] failed to comply with the OMB Circular, or with any other law or rule governing contracting out plainly falls within [the Statute's] expansive definition" of grievance. *EEOC v. FLRA*, 744 F.2d 842, 850 (D.C. Cir. 1984), *cert. dismissed*. 476 U.S. 19 (1986) (*EEOC*). First, because contracting-out decisions have a direct impact upon the continued employment of federal employees, challenges to violations of the Circular obviously constitute a "complaint . . . concerning any matter relating to the employment of the employee." 5 U.S.C. § 7103(a)(9)(A). Second, violations of the Circular are subject to the grievance procedure on an entirely separate ground, because the plain language and legislative history of the Statute demonstrate that the Circular is a "law, rule, or regulation affecting conditions of employment" (5 U.S.C. § 7103(a)(9)(C)(ii)) and therefore, necessarily an "applicable law" within the meaning of 5 U.S.C. § 7106(a)(2).

The Circular fits within the plain meaning of the term "rule" because it provides mandatory government-wide standards which agencies are required to use whenever a determination is made regarding contracting-out. Further, the legislative history of the Statute establishes that the phrase "law, rule, or regulation" includes the OMB Circular. In discussing Section 7117(a)(1) of the Statute, Congress directed that "rule or regulation" is not limited to formally promulgated regulations, but should "be interpreted as including official declarations of policy of an agency which are binding on officials and agencies to which they apply." H.R. Rep. 1717, 95th Cong., 2d Sess. 158 (1978), *Legislative History* at 826. The Circular, of course, is precisely such a binding policy directive.

Contrary to the government's arguments, rules that are issued for purposes of internal Executive Branch management are not exempt from the grievance procedure. Many of the key conditions of federal employment are set by informal rules like the Circular. Informal rules (including those contained in the multi-volume Federal Personnel Manual), have long been considered appropriate bases for grievances. Carving out such rules from the scope of the grievance procedure would mark a radical departure from accepted precedent in the federal sector.

The government's characterization of the Circular's provisions as amorphous, discretionary and subjective is a patent overstatement. The Union's proposal would permit challenges based upon the Supplement's specific rules for quantifying, measuring, or otherwise accounting for the agency's costs of performing a function in-house or under a contract. These rules may only be applied in a specific manner and contain specific prohibitions, the violation of which can be readily determined. Indeed, contracting-out rules whose standards are considerably less specific and objective than the standards of A-76 have been held to provide adequate basis for judicial review. *C.C. Distributors, Inc. and Whitman Distributing Company v. United States*, 883 F.2d 146 (D.C. Cir. 1989).

C. The management rights provision does not preclude employees from challenging violations of the Circular through the statutorily prescribed grievance procedure. That provision—which Congress intended should be narrowly construed—prohibits negotiation over substantive limitations on management's determinations, beyond those imposed by external authority or "applicable laws." *EEOC*, 744 F.2d at 848. The legislative history of the Statute demonstrates that Congress did not intend the management rights provision to prevent employees from filing grievances challenging violations of laws, rules, and regulations arising out of the exercise of management rights. The proposal at issue here does not offend management rights because it does not impose any substantive limitations upon agency decision-making with respect to contracting-out; those limitations exist by virtue of the Circular A-76 itself.

The government's arguments that the Union's proposal is nonetheless non-negotiable because it will permit arbitrators to second-guess legitimate exercises of managerial discretion and because arbitral review will result in undue delay and disruption, cannot withstand scrutiny. The FLRA has provided workable standards, based upon accepted tenets of judicial review of agency action, to insure that arbitrators do not override the exercise of management discretion. *Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, Local 2840*, 22 F.L.R.A. 656, 661 (1986) (*Blytheville*).

IRS, in fact, does not seem to take issue with the standards, but rather with the competence of the FLRA to apply the principles it has established. Congress clearly anticipated, however, that arbitrators in the federal sector, and the FLRA, would have a significant role in reviewing agency compliance with laws, rules, and regulations, and would be required to draw distinctions between rules that provide objective criteria, and those that do not.

Further, Congress obviously expected both arbitrators and the FLRA to develop substantial competence in vindicating the public law considerations underlying 5 U.S.C. § 7106 because they are routinely required to take those considerations into account in discharging their statutory responsibilities.

The government's arguments that arbitral review will inject unacceptable uncertainty and delay into the government's contracting out activity are equally unpersuasive in light of the FLRA's decision in *Blytheville*. That decision places significant restrictions upon the remedies an arbitrator may impose even where he finds a direct violation of non-discretionary requirements of the Circular which materially injured federal employees. In that circumstance, the FLRA has only authorized arbitrators to require the agency to "reconstruct" the cost comparison. Thereafter, the agency retains the discretion to "determine whether considerations of cost, performance, and disruption override cancelling the procurement action," and "take whatever action is appropriate on the basis of that determination." 22 FLRA at 662. The proposition that agencies will choose to delay their final decisions because they fear an arbitral award requiring them to "reconstruct" the cost comparison—even were it sufficient to constitute a violation of management rights —is far-fetched and unproven.

Finally, uncritical acceptance of the government's generic claims that arbitral review is inconsistent with "effective and efficient" government would negate the statutorily prescribed grievance procedure. Arbitrators in the federal sector are frequently called upon to review an agency's exercise of its management rights to determine whether they comply with laws, rules, and regulations. Such review will always necessarily present a potential for some delay or some inconvenience to management.

Congress simply did not contemplate, however, that claims of added expense, delay or inconvenience would excuse management from its duty to bargain. This Court should repudiate IRS' distortion of the management rights clause, and reject its effort to gut the dispute resolution mechanism that is so central to the balanced scheme and design of Title VII.

ARGUMENT

INTRODUCTION

The major purposes of Title VII of the Civil Service Reform Act were to strengthen the position of federal unions, to make collective bargaining a more efficient instrument of the public interest, and to preserve the ability of federal managers to maintain "an effective and efficient government." *Cornelius v. Nutt*, 472 U.S. 648, 650-51 (1985) (citations omitted). The overriding theme of the government's arguments in this case is that there is an inherent inconsistency between the collective bargaining process, including arbitral review, and effective and efficient government. Pet. Br. at 18-21. *Accord, Department of Health and Human Services v. FLRA*, 844 F.2d 1087, 1091 (4th Cir. 1988) (en banc).

This theme, however, is both fundamentally at odds with key policy decisions Congress made when it enacted Title VII, and belied by the useful role arbitral review of violations of Circular A-76 plays in enhancing compliance with the Circular. Congress did not perceive collective bargaining in general or binding arbitration in particular as disruptive impediments to "effective and efficient" government. On the contrary, it explicitly found that "statutory protection of the right of employees to organize, bargain collectively, and participate through organizations of their own choosing in decisions which affect them" "safeguards the public interest," "contributes to the effective conduct of public

business," and, moreover, "facilitates and encourages the amicable settlement of disputes between employees and employers concerning conditions of employment." 5 U.S.C. § 7101(a)(1); *see National Treasury Employees Union v. FLRA*, 810 F.2d 295, 300 (D.C. Cir. 1987).

Indeed, effective and efficient government is fostered, not impaired, by recognizing the legitimate rights of federal employees to challenge agency decisions which do not comport with mandatory and non-discretionary requirements of Circular A-76 and its implementing Supplement. Such challenges will necessarily enhance and encourage agency compliance with a directive that is designed to ensure that agencies provide services at the lowest cost—whether that be through continued use of civil service employees or through contracting-out to commercial suppliers. *Headquarters 97th Combat Support Group, (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, AFL-CIO, Local 2840*, 22 FLRA 656, 661 (1986) (*Blytheville*).

The government's contentions that the bargaining proposal at issue in this case would nonetheless undermine *its* notion of effective and efficient government are based upon two main premises. The first premise is that Circular A-76 is neither a "law, rule, or regulation affecting conditions of employment" whose violation is made explicitly subject to the grievance procedure by 5 U.S.C. § 7103(a)(9)(C)(ii), nor an "applicable law" qualifying management's right to make determinations with respect to contracting-out. 5 U.S.C. § 7106(a)(2). It does not dispute that these two phrases are co-extensive. Pet. Br. at 37-38. Rather, it argues that the Circular falls under neither rubric. It urges that A-76 is what it calls an internal "management tool," whose implementation is so dependent upon exercises of agency discretion that compliance with its directives can only be determined by the President. Pet. Br. at 24.

The second and related premise underlying the government's contentions is that allowing arbitrators to review an agency's compliance with the Circular would trench upon management's protected authority "in accordance with applicable laws . . . to make determinations with respect to contracting out." *Id.* at 28-38; 5 U.S.C. § 7106(a)(2). In particular, it asserts that if the Union's proposal were adopted, arbitrators would inevitably substitute their judgment for that of management in determining a grievance arising under the Circular (Pet. Br. at 29-31), and that arbitral review would add uncertainty and delay to the contracting-out process, with attendant adverse consequences. *Id.* at 31-35.

None of these contentions can withstand scrutiny. Disputes concerning an agency's compliance with the Circular fall precisely within the scope of the statutorily prescribed grievance procedure because the Circular is a "law, rule, or regulation affecting conditions of employment," and therefore, necessarily, an "applicable law" that constrains management's right to make determinations with respect to contracting-out. The government's argument that the management rights provision bars application of the grievance procedure to such disputes betrays at best, a fundamental misunderstanding of the statutory structure, and at worst, a basic hostility to the policies that underlie it.

I. VIOLATIONS OF OMB CIRCULAR A-76 AND ITS SUPPLEMENT ARE GRIEVABLE UNDER THE STATUTE.

In enacting Title VII of the CSRA, Congress gave federal employees and their unions a powerful tool for protecting employee rights. It mandated that every collective bargaining agreement in the federal sector contain a negotiated grievance procedure that culminates in binding arbitration. 5 U.S.C. §§ 7121(a), (b)(3)(C). It further mandated that all matters which fall within the

statutory definition of "grievance" *are* grievable unless the parties expressly agree otherwise. 5 U.S.C. § 7121(a)(2).[5] The language, structure, and purposes of the Statute clearly establish that grievances concerning an agency's compliance with mandatory, non-discretionary aspects of Circular A-76 and its Supplement fall squarely within the scope of the statutorily prescribed grievance procedure.[6]

A. The plain language and legislative history of the Statute establish that Circular A-76 is both "a matter relating to the employment" of federal employees and a "law, rule, or regulation affecting conditions of employment."

As this Court and others have recognized, the language Congress chose to define the term "grievance" under the Statute is "broad" and "expansive." *Cornelius v. Nutt*, 472 U.S. 648, 664 (1985); *EEOC*, 744 F.2d at 849.[7] A "grievance" is "*any* complaint by *any* employee concern-

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[5] *See*, H.R. Rep. No. 1717, 95th Cong., 2d Sess. 157 (1978), *Legislative History* at 825; *American Federation of Government Employees, Locals 225, 1507 and 3723, AFL-CIO v. FLRA*, 712 F.2d 640, 641-642 (D.C. Cir. 1983).

[6] IRS finds it "hard to see" why the Union offered the contested proposal if its inclusion in the collective bargaining agreement does not give the Union any more than it already possesses under the Statute. Pet. Br. 23, n.23. The practical advantages of doing so are set forth *supra* at 6-7, and should be quite familiar to petitioner IRS, which has routinely agreed in the past to similar provisions enumerating the scope of the grievance procedure within the contract itself.

[7] *Accord*, H.R. Rep. No. 1403, 95th Cong., 2d Sess. 40 (1978), *reprinted in Legislative History* at 689 (observing that the Statute was intended to be "virtually all inclusive in defining grievance"). As the Committee noted, the "net effect" of the broad definition would be limited by Section 7121(c), which "excludes certain grievances from being processed under a negotiated grievance procedure." H.R. Rep. No. 1717, 95th Cong., 2d Sess. 40 (1978), *Legislative History* at 686. The government does not contend that any of the exclusions set forth in Section 7121(c) apply in this case.

ing *any* matter relating to the employment of the employee" and "*any* claimed violation . . . of *any* law, rule, or regulation affecting conditions of employment." 5 U.S.C. §§ 7103(a)(9)(A), (C)(ii) (emphasis supplied).

"An allegation that [an agency] failed to comply with the OMB Circular, or with any other law or rule governing contracting-out, plainly falls within [the Statute's] expansive definition." *Equal Employment Opportunity Commission v. FLRA*, 744 F.2d 842, 850 (D.C. Cir. 1984), *cert. dismissed*, 476 U.S. 19 (1986) (*EEOC*). First, as the D.C. Circuit expressly held in *EEOC*, a claim that work was improperly contracted-out "surely" is a "matter relating to the employment of an employee" and therefore grievable under 5 U.S.C. § 7103(a)(9)(A). *Id.* at 850, n.18. The Circular itself recognizes that the provisions which the Union's proposal subjects to the grievance procedure concern matters that have a direct impact upon the employment of federal employees. It includes "[f]ederal employees and their representative organizations," as well as "bidders and offerors on the . . . solicitation" among those who can appeal specified decisions, including cost comparison determinations, through the internal agency appeal procedure. Circular A-76, § 6(g), Pet. Br. at 4a; Circular A-76 Supp., part I at p. I-15, Pet. Br. at 12a.

Moreover, violations of the Circular are subject to the grievance procedure on an entirely independent ground, because the Circular is a "law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9)(C)(ii).[8] The term "rule" has a well-established plain

[8] The government's central contention in this case is that the Circular and Supplement are not "laws," "rules," or "regulations" within the meaning of Section 7103(a)(9), and that, for the same reasons, they are not "applicable laws" within the meaning of section 7106(a)(2). It does not dispute that the Circular affects "conditions of employment," nor, given the expansive definition of that term, could it. *See Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 210 (1964).

meaning, both as a matter of common usage, and as a legal term of art. A "rule" is generally defined as "an established principle, standard, or guide for action." The New Webster Encyclopedic Dictionary of the English Language, 735 (1980 ed.). In the context of governmental action, the Administrative Procedure Act (A.P.A.) provides that the term " 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5 U.S.C. § 551(4).

This Court strongly presumes that "Congress expresses its intent through the language it chooses" and further "that the legislative purpose is expressed by the ordinary meaning of the words used." *INS v. Cardoza Fonseca*, 480 U.S. 421, 431-32 & n.12 (1987), *quoting INS v. Phinpathya*, 464 U.S. 183, 189 (1984). Circular A-76 and its accompanying Supplement clearly fit within the ordinary meaning of the term "rule" either as a matter of common usage or under the A.P.A.. The Circular and Supplement are mandatory, government-wide standards for deciding whether services should be performed in-house or by commercial suppliers. The Circular "establishes federal policy" on the issue of contracting-out and the Supplement "implements the policy in the Circular by establishing procedures for determining whether commercial activities should be operated under contract . . . or in-house . . . . Th[e] Supplement is an integral part of the Circular, and compliance with all parts of the Supplement is mandatory." Circular A-76 Supp., Introduction; *Appendix*, *infra* at 5a. Both the Circular A-76, and, in particular, the Supplement, contain detailed requirements and procedures that agencies are bound to apply and follow whenever a determination must be made regarding contracting-out. *See infra* at 28-30.

Further, although not necessary to concluding that they constitute "rules" under the CSRA, both the Circular and the Supplement bear a number of the attributes of binding legislative regulations.[9] The Circular and Supplement are issued by OMB's Office of Federal Procurement Policy (OFPP) pursuant to its statutory authority, 41 U.S.C. § 405.[10] The Circular was published in the Federal Register for notice and comment both in 1979 and in 1983. 44 Fed. Reg. 20556 (April 6, 1979); 48 Fed. Reg. 37110 (Aug. 16, 1983). The Federal Acquisition Regulations, which are published in the Code of Federal Regulations, explicitly reference and generally restate the Circular's requirements. 48 C.F.R. Subpart 7.3.

The Circular's status as a "law, rule, or regulation" is further confirmed by the legislative history of the Statute. Congress specifically discussed the meaning of the term "rule or regulation" in its description of Section 7117(a)(1) of the CSRA, which forbids agencies and unions from negotiating contract provisions which are "inconsistent with any Federal law or Government-wide rule or regulation." The Conference Committee explained that this term is not limited to formally promulgated "regulations," but should "be interpreted as including *official declarations of policy* of an agency which are binding on officials and agencies to which they apply." H.R. Rep. No. 1717, 95th Cong., 2d Sess. 158 (1978),

[9] The Statute does not limit the grievance procedure to formally promulgated regulations. Use of the term "rule" as well as the term "regulation" obviously contemplates that mandatory requirements are included, whether they are formal regulations or not.

[10] The OFPP was created by the Office of Federal Procurement Policy Act of 1974, Pub. L. 93-400, to provide overall guidance and to "prescribe policies and regulations to be followed by executive agencies in the procurement of needed goods and facilities." S. Rep. No. 693, 93d Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. and Ad. News 4589, 4590.

Legislative History at 826 (emphasis supplied). Because there is absolutely no indication that Congress intended the identical term, "rule or regulation" to have different meanings in different parts of the Statute, the term should be given the same meaning throughout. *Finnegan v. Leu*, 456 U.S. 431, 438 & n.9 (1982).[11]

If a different meaning were ascribed to the term "law, rule, or regulation" as used in the two sections of the Statute, it would not only violate accepted principles of statutory construction, it would also upset the balance the Statute strikes between the respective rights of the two parties to the collective bargaining agreement, the

[11] The government appears to have abandoned its earlier contradictory argument that the Circular is not a "law, rule, or regulation" for purposes of the grievance provision but *is* a "law, rule or regulation" for purposes of Section 7117(a)(1). Pet. Br. at 38, n.37. Instead, it now argues that if the Circular is a law, rule, or regulation under the definition of "grievance," then under 5 U.S.C. 7117(a)(1) the Union's proposal is not negotiable because it is inconsistent with the Circular itself, which states that it shall not be construed to create any right of appeal. *Id.*

As the D.C. Circuit has explained, however, a union proposal allowing grievances concerning violations of Circular A-76 is not inconsistent with the Circular because it does not "create" any new right of appeal; the right to enforce government-wide rules through the negotiated grievance procedure was created by the CSRA. *EEOC*, 744 F.2d at 851; *HHS*, 844 F.2d at 1108 (Murnaghan, J., dissenting). "Second", as the D.C. Circuit observed, "and more important, the Circular's restrictive language cannot be construed to limit the statutory right to file grievances asserting a violation of contracting out regulations. There is no indication in the Act or elsewhere of a congressional intent to allow agencies to limit by regulation the statutorily defined scope of the grievance procedure." *EEOC*, 744 F.2d at 851; *see also Office of Personnel Management v. FLRA*, 864 F.2d 165, 168-69 (D.C.Cir. 1988); *National Treasury Employees Union v. Cornelius*, 617 F.Supp. 365, 370-71 (D.D.C. 1985) (Office of Personnel Management cannot limit what matters are negotiable or grievable through regulation explicitly purporting to do so); *cf. Dyneteria, Inc.*, B-222581.3 (January 8, 1987) 87-1 CPD ¶ 30 (Circular A-76 does not limit authority of Comptroller General to review bid protests arising under the Circular).

union and the agency. Because so many aspects of the government's relationship with its employees are established by laws, rules, and regulations, narrowing the definition of that term only for purposes of the grievance provisions would mean that employees would be foreclosed from addressing numerous conditions of employment through any avenue—either at the bargaining table or through the grievance procedure. Management cannot have it both ways; a rule is insulated from bargaining because it is binding on agency managers. By definition, if it is binding on agency managers, its violation can be grieved.

B. The government's argument that internal management directives do not constitute "laws, rules, or regulations" or "applicable laws" is meritless.

As we have shown, the plain language and legislative history of the Statute establish that Circular A-76 is a "law, rule, or regulation affecting conditions of employment" and therefore, necessarily, an "applicable law" within the meaning of 5 U.S.C. 7106(a). IRS, nonetheless, makes the tautological argument that the Circular cannot be a "rule" or an "applicable law" because it is a "management tool" and because OMB did not intend to create a basis for challenging agency action by virtue of its issuance.

This argument is without merit. The fact that a rule stems from an internal management directive has never been thought to make it any less of a "rule" for purposes of the Statute's grievance provisions. Thus, for example, internal agency personnel manuals and other rules have often been the subject of the grievance procedure. *E.g., U.S. Department of Housing and Urban Development and American Federation of Government Employees*, 24 F.L.R.A. 442 (1986) (enforcing HUD "space management handbook"); *U.S. Naval Air Station, Key West, Florida and American Federation of Government Employees, Local 1566*, 16 F.L.R.A. 1077 (1984) (agency "merit promotion" regulation). Further, it is a longstanding and unchallenged practice under the Statute for employees to grieve and arbitrate challenges to violations of a "management tool" (Pet. Br. at 24) that is identical to the OMB Circular in all material respects, the multivolume Federal Personnel Manual (FPM). *See, e.g. Puget Sound Naval Shipyard and Bremerton Metal Trades Council*, 33 F.L.R.A. 56 (1988); *Robbins Air Force Base and American Federation of Government Employees, Local 1987*, 18 F.L.R.A. 899 (1985); *Veterans Administration Medical Center, Fort Howard and American Federation of Government Employees, AFL-CIO, Local 2146*, 5 F.L.R.A. 250 (1981).

The FPM is the "official medium of the Office of Personnel Management for issuing personnel instructions, operational guidance, policy statements, related material on government-wide personnel programs and advice on good practices in personnel management to other agencies." FPM, Chapter 171-5, Subchapter 2-1. The FPM contains provisions governing virtually every aspect of the employment relationship—from application and selection through removal or retirement. Although it does not explicitly so state, it is unlikely that OPM intended by issuing this manual for managers to "create" rights in employees. Nonetheless, because it is Congress' intent that is crucial here (see note 11, *supra*), not the intent of the management authorities, violations of the FPM can be grieved under the Statute.

The FPM stands on precisely the same footing as the Circular in three critical respects. First, both contain mandatory guidelines issued by agencies that have statutory authority to oversee and establish uniform policy in areas of government-wide concern. Second, both the Circular and the FPM have a direct effect upon basic employment issues. Third, both the Circular and the

FPM include some provisions that are mandatory and non-discretionary, and others that are not.[12]

In short, contrary to the government's unsupported suggestions to the contrary, the Statute's grievance provision does not distinguish between rules that are issued for purposes of internal Executive Branch management and those issued pursuant to specific Congressional direction. As noted, many of the key conditions of federal employment are set pursuant to rules of internal Executive Branch management, including internal government-wide rules like those set forth in the FPM or in OMB Circulars,[13] and internal agency rules set forth in official agency publications. Whether or not internal agency directives and manuals constitute formal "regulations" enforceable in a court,[14] carving such rules out from the scope of the grievance procedure would mark a radical departure from accepted precedent in the federal sector.[15]

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[12] Requirements in the FPM are considered binding and non-discretionary where their language and context indicate that OPM intends them to be so, whether or not the requirements are published as formal rules. *See Doe v. Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977). *Cf. Office of Personnel Management v. FLRA*, 864 F.2d 165, 171 (D.C.Cir. 1988).

[13] *See also, General Services Administration and American Federation of Government Employees, AFL-CIO, National Council 236*, 27 FLRA 3 (1987) (finding violation of OMB Circular A-105 grievable).

[14] *See* Pet. Br. at 38, citing *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (holding that provisions of social security manual may not be enforced in court).

[15] The government argues that our reading of the Statute would "have the perverse effect of 'transform[ing] basic tools of management into occasions for intrusion'" and would "present Executive officials 'with the Hobson's choice of surrendering control over the interpretation of policy directives or attempting to manage without such instructions to subordinates'." Pet. Br. at 40-41, *quoting HHS*, 844 F.2d at 1100. Despite the rhetoric, there is nothing novel, let

C. The Circular A-76 contains sufficient objective criteria to permit third party review.

It is noteworthy that although the phrases "law, rule, or regulation" and "applicable laws" are at the heart of this case, IRS has made no effort whatsoever to give content to them. Instead, it attempts to evade that obligation by describing the Circular and its Supplement variously as a "management tool" (Pet. Br. at 24) or "mere policy guidelines" (Pet. Br. at 28), or "the method the President has utilized to provide agency management officials with guidance on how they should go about exercising the reserved right to make contracting-out determinations." (Pet. Br. at 40). Its argument suggests that the Circular is nothing more than a set of amorphous and almost entirely discretionary guidelines agencies use to implement a very general policy regarding the use of commercial suppliers.

The government's characterization of the Circular's provisions as amorphous, discretionary and subjective is a patent overstatement. All parties to this case agree that *some* aspects of Circular A-76 (like some aspects of virtually any law, rule, or regulation) involve exercises of discretion which are not susceptible to review by third parties, whether they be arbitrators or courts. The government asserts that these include determinations, for example, whether a particular activity is inherently "governmental" or "commercial," the configuration of employees and resources that will lead to the most efficient in-house performance, and various other matters that it says are

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alone "perverse," about permitting third party review of an agency's compliance with externally imposed rules. Indeed, courts can even review an agency's compliance with its own regulations. *See, e.g. Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959); *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987). The existence of such review has never deterred agencies from issuing rules and we doubt that a decision affirming the grievability of the OMB Circular will lead to its rescission.

left to management's "informed judgment," including Part III of the Supplement, the "Management Study Guide." Pet. Br. at 25.

Whether some or all of these decisions can or cannot be measured against objective criteria in the Circular, is of no moment to the issue in this case, because the explicit terms of the Union's proposal do not permit employees to challenge decisions the Circular leaves to management's discretion. The Union's proposal permits employees to challenge only those decisions which are appealable under the Circular's own internal appeal procedure. That procedure explicitly differentiates non-reviewable "government management decisions" regarding contracting-out from the reviewable "cost comparisons" which may be judged against objective standards such as those contained in Part IV of the Supplement. *See* Circular A-76 Supp., part I, p. I-14; Pet. Br. at 12a.[16]

In fact, the Circular and the Supplement include a multitude of detailed, non-discretionary requirements whose proper application can be measured by objective standards, may be challenged through the internal appeal procedure, and are susceptible to third party review. These requirements consist of specific rules for quantifying, measuring, or otherwise accounting for the agency's costs of performing a function in-house or under a contract. They may only be applied in a specific manner and contain specific prohibitions, the violation of which can be readily determined.

As one commentator has explained, "[a]pplication of the cost estimate criteria in Part IV of the Supplement [the "Cost Comparison Handbook"], though often complex and subject to dispute, is fundamentally a non-discretionary function subject to review under objective standards." Ketler, *Federal Employee Challenges to Contracting Out: Is There a Viable Forum*, 14 Mil. L. Rev. 103, 116 (1986). For example, the Supplement states that agencies must use the same statement of the scope of the work for the in-house and contractor estimates. Circular A-76 Supp., part IV p. IV-2, Appendix, *infra* at 7a. They may only convert an in-house activity to contractor performance if the "cost differential" shown on line 14 of the "Cost Comparison Form" favors contractor performance by at least 10 percent of the in-house estimate. *Id.* at p. I-11. The agency must use "standard cost factors prescribed in Part IV to the Supplement," and must fully explain in writing any variations in costing from these factors. *Id.*

Further, the Cost Comparison Handbook "provides detailed instructions for developing a comprehensive comparison of the estimated cost to the Government of acquiring a service by contract" or in-house. *Id.* part IV, p. IV-1, Appendix, *infra* at 6a. The Handbook follows the Cost Comparison Form (Appendix, *infra* at 11a) "line-by-line" and "each line is explained in sufficient detail to include computations which must be made and documentation which must be retained." *Id.* It provides specific rules for the computation of inflation (*id.* at p.IV-6-7), the cost of personnel and their fringe benefits (including standards for retirement, FICA, insurance and workers' compensation) (*id.* at p. IV-7-11), depreciation (*id.* at p. IV-21), rent (*id.* at p. IV-23), maintenance and repair (*id.* at p. 23) utilities (*id.*), insurance (*id.* at p. 23-27) certain overhead costs (*id.* at p. IV-27-32), tax adjustments (*id.* at p. IV-35-36), contract administration (*id.* at p. IV-36), and labor related conversion costs (*id.* at p. 38).

[16] In this respect, the Union's proposal here is narrower than the proposals at issue in both *EEOC* and *HHS*. NTEU's proposal could not encompass challenges to government management decisions because it is merely a substitute for the internal appeals procedure, which itself excludes such challenges.

These standards provide ample grounds for third party review on the basis of objective criteria.[17] Indeed, the rules A-76 establishes provide significantly more objective criteria and detail than the contracting out rules whose violation was recently found subject to judicial review in *C.C. Distributors, Inc. and Whitman Distributing Co. v. United States*, 883 F.2d 146 (D.C. Cir. 1989). In *C.C. Distributors*, the D.C. Circuit found reviewable agency decisions under DOD regulations which: 1) required the government to use commercial sources unless "no satisfactory commercial source is available"; 2) required an agency to conduct a cost comparison whenever performance by a commercial source was permissible; and 3) prohibited the agency from providing commercial products or services "if the products or services can be procured more economically from the commercial sources" than in-house. *Id.* at 154.

In *C.C. Distributors*, the court rejected the government's argument that these rules were too standardless

[17] In fact, the Comptroller General routinely reviews contract disputes to determine whether the agency has complied with the non-discretionary requirements of the Circular A-76 provisions. This review occurs in the context of "protests" by disappointed bidders to the General Accounting Office (GAO) that their contract bids have been improperly rejected. 31 U.S.C. § 3551(1); 48 C.F.R. 33.104. *See Contract Services Co., Inc.*, B-231539, September 15, 1988, 88-2 CPD ¶ 249 (Navy used incorrect tax rate in calculating contractor's deduction for federal taxes); *Department of the Navy—Request for Reconsideration*, B-22891.2, April 7, 1988, 88-1 CPD ¶ 347 (in-house and contract bid not based on same scope of work); *Aspen Systems Corp.*, B-228591, February 18, 1988, 88-1 CPD ¶ 166 (in-house estimate failed to include position contained in performance work statement); *General Services Administration—Request for Reconsideration*, B-221089.2, June 16, 1986, 86-1 CPD ¶ 553 (in-house cost estimate varied materially from management study statement of number of supervisors needed to perform work); *Bara-King Photographic, Inc.*, B-226408.2, August 20, 1987, 87-2 CPD ¶ 184 (request for proposal contained unreasonable performance bond requirements which exceeded risk to agency); *Department of the Navy—Request for Advanced Decisions, Holmes & Narver Services, Inc.*, B-229558.2, October 4, 1988, 88-2 CPD ¶ 310 (Agency may not consider bidder "not responsible" simply because bid envisions using fewer personnel than agency expects are necessary).

to allow A.P.A. review. "These regulations" the court observed, "seem to incorporate standards susceptible to judicial review: Is a 'satisfactory' commercial source 'available'? Was a cost comparison done? Is the commercial source 'more economical' than in-house provision." *Id.* Further, in *C.C. Distributors*, the court also held that the DOD rules defining a "governmental function," (which could not be performed by a commercial supplier), were sufficiently detailed to permit judicial review. *Id.* at 155. Those rules included a long list of examples of functions that were considered "governmental" in nature. *Id.; cf.* Circular A-76, § 6(e), Pet. Br. at 3a, 10a. The court concluded that to review whether a function had properly been classified as "governmental," it "would simply need to ask whether the activity in question is, in relevant respects, similar to the enumerated activities and to give appropriate deference to the agency's answer." *Id.*[18]

[18] On the other hand, the court concluded that a statute which permitted the Secretary of Defense not to contract-out services to the private sector where he made a determination that the functions "must be performed by military or government personnel," "does not provide an objective standard by which a court can assess which functions must be performed by government employees." 883 F.2d at 153.

IRS fails to discuss *C.C. Distributors* in its brief. Instead, IRS relies upon *American Federation of Government Employees, Local 201 v. Brown*, 680 F.2d 722, 726 (11th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983), in support of its argument that the Circular is entirely discretionary and provides no standards suitable for judicial review. Pet. Br. at 27. That case, however, did not even directly concern the reviewability of decisions made pursuant to the Circular, and does not support IRS' sweeping contentions.

In *Brown*, the union alleged that the Army's decision to contract-out violated the requirements of a federal statute. The court held the Army's decision unreviewable because it found that the statute in question was "not replete with discernible guidelines against

Thus, there is no merit to the government's argument that OMB Circular A-76 does not contain standards sufficiently objective to permit third party review. Circular A-76 is a "law, rule, or regulation affecting conditions of employment," and its violations are subject to the grievance procedure under the plain language of Section 7103(a)(9).

II. THE MANAGEMENT RIGHTS CLAUSE DOES NOT PRECLUDE EMPLOYEES FROM CHALLENGING VIOLATIONS OF THE CIRCULAR AND ITS SUPPLEMENT THROUGH THE GRIEVANCE PROCEDURE.

As explained, Section 7121(a) of the Statute requires the parties to negotiate procedures for grieving and arbitrating any employment-related complaints, or any violations of laws, rules, or regulations affecting conditions of employment, except in those subject areas specifically enumerated in subsection (c). Although complaints or violations of rules concerning contracting-out are not among those excluded matters, IRS' central contention here is that the management rights clause, 5 U.S.C. § 7106(a)(2)(B), bars use of the grievance procedure to

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which the agency decision may be measured." *Id.* at 726. It then compared the Statute to OMB Circular A-76, which, it said, was more detailed, and yet had been found unreviewable in a series of decisions.

Of course, the court did not conduct an independent evaluation of either the Circular as a whole, or any of its particular provisions. It is not even apparent from the decision in *Brown* that the court understood that the decisions it was citing involved challenges predicated upon the pre-1979 Circular, under which "no specific standard or guideline [was] prescribed for deciding whether savings are sufficient to justify continuation of an existing Government commercial activity" in-house (OMB Circular A-76 (1967) § 7(C)(3)), and which was not accompanied by a detailed Supplement. The very general and conclusory discussion of Circular A-76 in *Brown* hardly provides support for the broad generalizations the government makes here.

resolve complaints regarding violations of OMB Circular A-76.

In particular, IRS maintains that by saying "nothing in this chapter shall affect" the authority of management "in accordance with applicable laws" to make the enumerated determinations, Congress intended to afford management rights a pre-eminent position in the Statute's collective bargaining scheme. Pet. Br. 21-22. It further argues that subjecting disputes arising under the OMB Circular to the grievance-arbitration process would "fly in the face" of this intent. *Id.* at 28. These contentions are without merit and would eviscerate the statutorily prescribed grievance procedure.

A. The Union's proposal does not infringe management rights because it does not impose any substantive limitations upon agency decision making with respect to contracting-out.

The CSRA's management rights provision states, in relevant part, that "subject to subsection (b) of this section nothing in [Title VII] shall affect the authority of any management official of any agency— . . . in accordance with applicable laws— . . . to make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2). The purpose of the management rights provision "is to place limits on the number of subjects which agency management may bargain with a labor organization." H.R. Rep. No. 1403, 95th Cong., 2d Sess. (1978), *Legislative History* at 689; See also S.Rep. No. 969, 95th Cong., 2d Sess. 108 (1978), *Legislative History* at 768; *Department of Defense, Army-Air Force Exchange Service v. FLRA*, 659 F.2d 1140, 1145-6 (D.C. Cir.), *cert. denied*, 455 U.S. 945 (1982).

In contrast to the grievance provision, and contrary to the government's arguments in this case, it could not be clearer that Congress did *not* intend for the FLRA or the courts to interpret the management rights provision broadly. Instead, as Rep. Udall, a chief architect of the

compromise that became the final version of Title VII explained, Congress intended the management rights provision to "be treated narrowly as an exception to the general obligation to bargain over conditions of employment." [19] Congress, in fact, repudiated the expansive interpretation of management rights followed by the management-controlled Federal Labor Relations Council under the Executive Order regime.[20] It intended that sec-

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[19] 124 Cong. Rec. H9634 (daily ed. Sept. 13, 1978), *Legislative History* at 924 (Statement of Rep. Udall). *Accord*, 124 Cong. Rec. H9639 (daily ed. Sept. 13, 1978), *Legislative History* at 934 (Statement of Rep. Clay); 124 Cong. Rec. H9648-9 (daily ed. September 13, 1989), *Legislative History* at 953-4 (Statement of Rep. Ford); *HHS*, 844 F.2d at 1103-1106 (Murnaghan, dissenting); *Overseas Education Association, Inc. v. FLRA*, 876 F.2d 960, 960-69 (D.C. Cir. 1988) (opinion of Robinson, J., not joined by concurring opinions).

We note that the majority in *HHS v. FLRA* quotes Representative Udall for a contrary proposition, that the management rights clause was intended to be given broad application and paramount importance in the collective bargaining scheme. 844 F.2d at 1091, *quoting* 124 Cong. Rec. H9633 (daily ed. Sept. 13, 1978), *Legislative History* at 923. However, the passage quoted made no reference to the management rights provision and the Fourth Circuit failed to read the passage in context.

In stating that the "bill" would give management "broad new rights" and "enable them to move," Congressman Udall was referring in large part to changes the other chapters of the CSRA would effect to streamline discipline and removal of employees. *See United States v. Fausto*, —— U.S. ——; 108 S.Ct. 668, 672 (1988). He observed that it would be a "mistake" to view Title VII as unrelated to the remainder of the CSRA legislation, which deals "with management prerogatives in the Federal Service." His statement concluded that "the President's program basically deals with strengthening management, Senior Executive Service, merit pay for supervisors and management, separating the operating functions of the Civil Service from the judicial functions." "None of *these* management tools," he said, would be affected by Title VII. *Id.* at 923 (emphasis supplied).

[20] See, *HHS v. FLRA*, 844 F.2d at 1104 & n.7 (Murnaghan, J., dissenting), citing 124 Cong. Rec. H9638 (daily ed. Sept. 13, 1978)

tion 7106 "be read to favor collective bargaining whenever there is doubt as to the negotiability of a proposal." [21]

Further, Congress enacted the management rights provision to protect the authority of management to make substantive decisions. It did not, however, intend to insulate those decisions from arbitral review to determine whether they comply with binding external rules. As Rep. Udall observed, Section 7106:

> preserves management's right to make the final decisions . . . . in accordance with applicable laws, including other provisions of chapter 71 of title 5. For example, management has the reserved right to make the final decision to "remove" an employee, but that decision must be made in accordance with applicable laws and procedures, and the provisions of any applicable collective bargaining agreement. The reserved management right to "remove" *would in no way affect* the employee's right to appeal the decision through statutory procedures or, if applicable, through the procedures set forth in a collective bargaining agreement.

124 Cong. Rec. H9634 (daily ed. Sept. 13, 1978), *Legislative History* at 924 (emphasis supplied).[22]

(Statement of Rep. Clay), reprinted in *Legislative History* at 932, *id.* at H9649 (Statement of Rep. Ford), reprinted in *Legislative History* at 955.

[21] H.R. Rep. 1403, 95th Cong. 2d Sess. 43-44 (1978), *Legislative History* at 689-90; *see also* 124 Cong. Rec. H9638 (daily ed. Sept. 13, 1978), *Legislative History* at 932-33 (Statement of Rep. Clay).

[22] Representative Ford, one of the chief House conferees on the bill who was described by Congressman Udall as having "played a key, critical role" in the compromise and as having "made it possible," 124 Cong. Rec. H9648 (daily ed. Sept. 13, 1978), *Legislative History* at 952, described on the floor of the House the relationship of the new, expanded grievance procedure to the management rights clause:

> [S]o long as a rule or regulation "affects conditions of employment," infractions of that rule or regulation are fully

Thus, the management rights provision prohibits negotiation over substantive limitations on management's determinations, beyond those imposed by external authority. *EEOC*, 744 F.2d at 848. In fact, the portion of the management rights clause at issue in this case makes this point explicit. Although it "obviously must be the case even without words to that effect,"[23] 5 U.S.C. § 7106(a)(2) acknowledges that management rights must be exercised "in accordance with applicable laws." "Because the Act does not grant to management unqualified authority to contract out, union proposals touching upon that authority are not automatically rendered non-negotiable. Rather, management may refuse to bargain over only those proposals that would expand upon the restrictions in the Act." *EEOC*, 744 F.2d at 848.

The Union's proposal to permit arbitrators to review an agency's compliance with Circular A-76 simply does

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grievable even if the rule or regulation implicates some management right. This interpretation of the definition is required both by the express language of the section and by the greater priority given the negotiability of procedures over the right of management to bar negotiations because of a retained management right.

124 Cong. Rec. H13609 (daily ed. Oct. 14, 1978) *Legislative History* at 998.

Representative Ford's remarks were made shortly after the Statute was enacted and therefore are not dispositive of Congressional intent. However, given Rep. Ford's pivotal role in shaping the final legislation, similar remarks on his part have been found helpful to the task of statutory construction in the past. *See National Federation of Federal Employees v. FLRA*, 652 F.2d 191, 193 (D.C. Cir. 1981); *National Treasury Employees Union v. FLRA*, 774 F.2d 1181, 1187 n.10 (D.C. Cir. 1985).

[23] *National Federation of Federal Employees v. FLRA*, 828 F.2d 834, 838-839, n.30 (D..C Cir. 1987). The government cites this case for the proposition that the Circular is not an "applicable law," because "it was not intended to qualify management authority in favor of union participation." Pet. Br. at 25. However, the very passage in *NFFE* which the government cites distinguished OMB Circular A-76, which the D.C. Circuit had found grievable in *EEOC*.

not impose any substantive limitations upon agency decision-making with respect to contracting-out; nor does it require agencies to bargain over the criteria they will use. Those limitations and requirements exist whether or not the Union's proposal is ever adopted, because they are imposed by Circular A-76 itself. Accordingly, the Union's proposal, contrary to IRS' claim (Br. 22-23), does not make agency compliance with the Circular "a proper subject of negotiation" under the Statute, nor does it require management to bargain about how it exercises its authority. In short, the proposal does not "affect the authority of any management official of any agency— . . . . in accordance with applicable laws— . . . . to make determinations with respect to contracting out."[24]

B. The Agency's contentions that arbitral review would cause undue delay and hamper effective and efficient government are meritless and would eviscerate the grievance provisions of the Statute.

There are two major arguments underlying IRS' position that arbitral review will nonetheless impermissibly

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[24] Because the Union's proposal does not impose any additional restrictions upon management's authority to make contracting-out decisions, it is not necessary to rely upon 5 U.S.C. § 7106(b)(2) to establish its negotiability as a "procedure which management officials . . . . will observe in exercising" their authority. See Pet. Br. 36, n.35. We note, however, that while the FLRA did not ground its decision in this case upon that provision, it has subsequently held that similar proposals do constitute negotiable procedures. *American Federation of State, County and Municipal Employees and Department of Justice, Management Division*, 31 F.L.R.A. 322, 339-345 (1988); *see EEOC*, 744 F.2d at 848, n.12.

Further, we note that the Statute also makes negotiable proposals which concern "appropriate arrangements for employees adversely affected by the exercise" of management authority. 5 U.S.C. 7106(b)(3). The Union's proposal would likely be negotiable on this basis as well because, as we show *infra*, it does not "excessively interfere" with the exercise of management rights. See *e.g. American Federation of Government Employees, Local 2782 v. FLRA*, 702 F.2d 1183, 1187-1188 (D.C. Cir. 1983).

"affect" its right to make determinations with respect to contracting-out. First, IRS contends that arbitral review will "inevitably" lead to second-guessing of discretionary management decisions by arbitrators. Pet. Br. 29-31. Second, it contends that arbitral review will result in undue delay and uncertainty in the contracting-out process. *Id.* at 31-38.

For at least three reasons, these contentions—which are based largely upon premises which conflict with the statutory scheme—cannot withstand scrutiny. First, the FLRA has provided workable standards in the contracting-out area to prevent arbitrators from interfering with legitimate exercises of management rights. Second, the agency's strained contentions that such review will cause undue delay and disruption are neither proven nor worthy of credence. Third, and despite the government's protestations to the contrary (Pet. Br. at 37), the logical extension of the government's assorted objections to arbitral review in this case would be to exempt from the grievance and arbitration procedure review of virtually *all* exercises of management rights.

1. *Arbitral review will not lead to interference with legitimate exercises of agency discretion.*

IRS argues that "external oversight of agency determinations under Circular A-76 would inevitably lead to improper second-guessing of legitimate exercises of managerial discretion." Pet. Br. 29. Acceptance of this premise, however, is in large part dependent upon acceptance of IRS' corollary argument that the Circular is bereft of "meaningful standards" (*id.*), an argument we have already shown to be meritless. *See supra* at 27-30. The government's further contention that there are no workable standards that can adequately cabin arbitral review in this area is equally unpersuasive. Pet. Br. 30.

In *Blytheville*, the FLRA's first decision defining the proper scope of arbitral review in the contracting-out

area, the Authority expressly adopted as its standard of review the well-established principles the courts apply under the A.P.A., when they determine whether decisions are "committed to agency discretion by law" and the standards the Comptroller General uses in adjudicating bid protests. 22 F.L.R.A. at 660-661; *see supra* at 30-31. Thus, *Blytheville* held that arbitrators may review an agency contracting-out determination only for purposes of deciding whether the agency "violated mandatory provisions of procurement laws and regulations . . . [which] contain sufficiently specific standards to objectively analyze and review the agency's actions . . . ." *Id.* at 661. It cautioned that "arbitrators must distinguish between permissible challenges based on material defects in aspects of the procurement process specifically prescribed by law or regulation and improper challenges attacking the exercise of management discretion." *Id.* Further, the FLRA stated, "the arbitrator must also find that the agency's violations "materially affected the final procurement decision and harmed unit-employees." *Id.*

These standards are entirely consistent with accepted tenets of judicial review. In fact, we do not understand the government to press a serious objection to the sufficiency of these standards as guides for arbitral review of contracting-out decisions, but rather to the competence of arbitrators and the FLRA to apply them. Pet. Br. 32-33. It speculates that the constraints *Blytheville* imposes will not be enforced because *Blytheville* requires arbitrators to take account of "the public law considerations" underlying 5 U.S.C. § 7106, a task, it says, neither arbitrators nor the FLRA are qualified to perform. Pet. Br. at 31 (citation omitted).

The notion that arbitrators and the FLRA are not competent to make decisions either interpreting the law, or taking account of protection that the management rights provision affords agency discretion is utterly at

odds with the statutory scheme. Congress fully contemplated that arbitrators in the federal sector—unlike their counterparts in the private sector—would have a significant role in reviewing agency compliance with laws, rules, and regulations. Congress expressly gave the FLRA the unreviewable authority to determine exceptions to arbitral awards to assure that the awards are not "contrary to any law, rule, or regulation." 5 U.S.C. § 7122(a)(1). As one leading treatise has explained:

> The basic function of the grievance procedure and arbitration in private employment is to assure compliance with the collective bargaining agreement. While this is also a key function of the grievance procedure and arbitration in the federal sector, there they have dual basic roles. The second and also very important function of the grievance procedure and arbitration in the federal sector is to review or police compliance with controlling laws, rules, and regulations by federal agency employers and employees alike.

F. Elkouri and E. Elkouri, *How Arbitration Works*, 52 (4th Ed. 1985); *accord*, *Devine v. White*, 697 F.2d 421, 438 (D.C. Cir. 1983).

Further, and again contrary to the government's arguments (Br. 30-31), Congress obviously expected both arbitrators and the FLRA to acquire substantial competence in applying the "public law considerations underlying [5 U.S.C. 7106]." Pet. Br. 31. The FLRA, in fact, routinely considers 5 U.S.C. § 7106 in the course of discharging virtually all of its statutory responsibilities, not only in reviewing arbitral awards, but in deciding negotiability questions and unfair labor practices. It has not hesitated to invalidate an arbitral decision that it concluded actually impinged upon legitimate management prerogatives. *E.g.*, *Congressional Research Employees Association and Library of Congress*, 23 F.L.R.A. 137

(1986) (contract terms which impose additional substantive criteria on contracting-out not enforceable); *Naval Air Station, Whiting Field and American Federation of Government Employees, Local 1954*, 22 F.L.R.A. 1059 (1986) (arbitrator may not order reconstruction of cost comparison on the basis of his "feel[ing]" as to Congressional intent).[25]

2. *Arbitral review will not result in unacceptable uncertainty or delay.*

The government also argues that subjecting agencies' Circular A-76 determinations to grievance and arbitration would violate the management rights provision because it would "interject[] an unacceptable element of

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[25] The government claims that in *Blytheville*, the FLRA upheld a portion of an arbitral award which was based upon agency errors that the government says "turned largely on matters of discretion." Pet. Br. 30, n.28; *see also HHS*, 844 F.2d at 1092-93. The government asserts that the discretionary decision related to the agency's determination of the grade level required for a temporary employee. *Id.*

The government's assertion is incorrect. In *Blytheville*, the FLRA upheld ths arbitrator's finding that the agency had "improperly accounted for the grade of a temporary position." 22 F.L.R.A. at 662. A review of the arbitrator's decision confirms that the arbitrator did not second-guess the agency's judgment that, to promote efficiency, a temporary position should be assigned a higher grade level. *See* 844 F.2d at 1093. The arbitrator, in fact, expressly acknowledged that he did *not* challenge the agency's right to make that *judgment*. In light of specific evidence that in preceding years the agency had assigned the position a lower grade, however, the arbitrator concluded that the agency had made no judgment at all, but had inflated the grade level solely for the purpose of elevating its in-house estimate. *See In the Matter of Arbitration Between Headquarters, 97th Combat Support Group (SAC) Blytheville Air Force Base, Arkansas and AFGE, Local 2840*, LAIRS 14383 (Aug. 9, 1982) (Moore, Arb.), at 15.

uncertainty and delay into the government's contracting out activity." Pet. Br. 31-32. As explained *infra*, at 45-48, it is highly unlikely that such generic objections to arbitral review can ever be sufficient to demonstrate interference with management rights, because to so rule would allow the management rights provision to cancel out the statutorily mandated grievance and arbitration provisions. But even assuming that such objections could ever be considered sufficient to preclude arbitral review, they cannot in this case because they are belied by the *Blytheville* decision, and, in any event, thoroughly speculative.

In *Blytheville*, the FLRA placed important restrictions upor the remedies an arbitrator may impose, even where he finds a direct violation of non-discretionary requirements of the Circular which materially injured federal employees. Most significantly, the FLRA held that the arbitrator may not invalidate the contract. Instead, he may only order the agency to reconstruct the cost comparison. 22 F.L.R.A. at 661-662. Further, under *Blytheville*, even if the agency determines on reconstruction that its past decision to contract-out can no longer be justified, it retains the discretion to "determine whether considerations of cost performance and disruption override cancelling the procurement action," and to "take whatever action is appropriate on the basis of that determination." *Id.* at 662.

Because these restrictions upon the arbitrator's authority undermine any serious argument that arbitral review will disrupt the contracting-out process, IRS must strain to locate other injuries that could result from the limited remedy the FLRA has thusfar approved. It now says that fear of being required to engage in a reconstruction of the cost comparison may lead agency officials to put off implementing a contract pending completion of the arbitration process, which it claims may "take

months, or even years, to run its course." Pet. Brief at 32. Building upon this shaky foundation, the government erects a house of cards, speculating further that such delay will ultimately invalidate the original cost comparison by making it outdated, encourage bidders to adjust their bids to account for delay, or discourage bidders from submitting a bid at all.

No objective support exists for the government's speculation that agencies are likely to delay making contracting out decisions because they find the reconstruction process burdensome.[26] Indeed, the FLRA's decision in *Blytheville* permits the arbitrator to award a remedy markedly less potent than those available to courts when they review procurement decisions alleged to violate government regulations.

Courts have the power to enjoin the performance of a contract if the contract award "was the result of procedures not comporting with the law." *Sea Land Services Inc. v. Brown*, 600 F.2d 429, 433 (3d Cir. 1979); *Choctaw Manufacturing Co. v. United States*, 761 F.2d 609, 619 (11th Cir. 1985). They also have the authority to order the government to award a contract to an unsuccessful bidder. *Id.; Delta Data Systems Corporation v. Webster*, 744 F.2d 197, 204 (D.C. Cir. 1984). Where these remedies would be too disruptive or otherwise inappropriate, the court may look to less intrusive remedies, including reconstruction of the bidding process and/or damages. *Delta Data*, 744 F.2d at 206-207.

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[26] We note here that when the *EEOC* case was before this Court, almost four years ago, the government's chief practical objection to arbitral review was that arbitrators might claim the authority to cancel procurement actions and rescind contracts. *Petition for a Writ of Certiorari, EEOC v. FLRA*, No. 84-1728, at 10. *Blytheville* has removed that cause for concern. Similarly, in that case, the government informed the Court that its estimate showed that delays resulting from arbitral review would cost it 142 million dollars between 1986-1989. *Id.* at 9-10. That prediction has also apparently failed to come to pass.

There is no indication that the "uncertainties" arising out of these proceedings have unduly delayed agency decisions or discouraged contractors from bidding on lucrative government contracts. Instead, they have vindicated the public's interest in strict adherence to the rules applicable to government contracting. *Choctaw*, 761 F.2d at 619; *Superior Oil v. Udall*, 409 F.2d 1115, 1119 (D.C. Cir. 1985).

Further, to the extent that some agencies do choose to delay their final decisions, that exercise of self-restraint can hardly be considered interference with management rights. Allowing the agency to manufacture its own "uncertainty" and then use it to preclude arbitration would have broad and undesirable ramifications well beyond the area of contracting-out.[27]

Similarly the Agency's claim that the grievance and arbitration process takes "months and even years" to complete is an overstatement. Congress decided to expand the use of grievance/arbitration in the federal sector in large part because the limited experience under the Executive Order had demonstrated that arbitration is "an expeditious, credible, and cost effective means of dispute resolution" whose use should be expanded. 124 Cong. Rec. H8468 (daily ed. Aug. 11, 1978) (Statement of Rep. Ford), *Legislative History* at 856; *see also id.* at 923 (remarks of Rep. Udall); *Department of Defense, Army-Air Force Exchange Service*, 659 F.2d at 1158 n.98.[28]

[27] For example, an agency might well claim that "uncertainties" arising out of arbitral review of the legality of a reduction-in-force, which can result in a restructuring of the entire agency, will lead it to delay effectuating lay-offs necessary to keep within its budget. In that case, in fact, the incentive to delay would be greater, because if the lay-off were found illegal, the agency would not only have to reconstruct its decision, it might have to reverse it.

[28] IRS relies on statements by the D.C. and Fourth Circuit to support its assertion that arbitration may take "years." Pet. Br. at 32; Pet. App. 7a; *HHS*, 844 F.2d at 1094. Judge Wilkinson initially made this observation with regard to the original, precedent-setting arbitrations which took some time for the FLRA to decide. *Id.* There is no reason to suppose that there would be a similar delay in routine cases in the future, where the arbitrator's jurisdiction and role are well-established.

Moreover, as NTEU pointed out before the FLRA in this case, expedited grievance and arbitration procedures are a common feature of IRS-NTEU contracts. J.App. D.C. at 42. If these procedures were used, contracting-out challenges could be completed in 30 days.[29] Further, if the Union proposal is found negotiable, the agency is also free to offer counter-proposals that ensure the arbitral process is completed with all due speed. *Department of Defense, Army-Air Force Exchange Service v. FLRA*, 659 F.2d at 1157 (observing that "in collective bargaining, government managers are presumably competent to look out for government interests").

3. *The Agency's position would eviscerate the statutorily prescribed grievance procedure.*

Finally, uncritical acceptance of the government's generic claims of delay, inconvenience, and "second-guessing" would have momentous consequences for the statutorily prescribed grievance procedure. Arbitrators are frequently called upon in the federal sector to review an agency's exercise of its management rights to determine whether it complies with laws, rules, and regulations.[30] In many, if not most instances, the arbitrator will be re-

[29] This is the same amount of time as is allowed for the internal administrative appeal process that our proposal would supplant. Circular A-76 Supp. IV-13, Pet. Br. at 13a.

[30] In *Cornelius v. Nutt, supra*, for example, the Court evaluated the standards to be applied by arbitrators in grievances concerning a most basic management right, the right to take disciplinary action. 5 U.S.C. § 7106(a)(2)(A). See also, *Andrade v. Lauer*, 729 F.2d 1478, 1484-89 (D.C. Cir. 1984) (recognizing right of employees to file grievances challenging lay-offs that do not comply with OPM regulations).

quired to distinguish between rules that provide objective criteria against which management's decisions can be judged, and those which do not, and to consider the effect of the management rights clause.[31]

Further, in virtually every instance, an agency can claim that arbitral review delays or "disrupts" the exercise of its rights, especially where, as here, the delay stems from the agency's own decision not to exercise its rights while arbitral proceedings are pending. Indeed, similar claims might be offered to negate other rights the Statute specifically affords employees and unions, such as the union's right to be present at "formal discussions" (5 U.S.C. 7114(a)(2)(A)) or employees' rights to seek union representation in connection with an interrogation. 5 U.S.C. 7114 (a)(2)(B). Effects such as expense, "delay" or inconvenience to management do not, however, constitute infringement of management's

[31] For example, the FLRA has held that arbitrators may not review the merits of an agency's revocation of a security clearance, but may review the revocation for compliance with non-discretionary procedural requirements. *United States Information Agency and American Federation of Government Employees, Local 1812*, 32 F.L.R.A. 739 (1988). Similarly, it is well-established in the federal sector that a union proposal that establishes the substantive criteria underlying a performance standard is not negotiable because it would affect management rights to "direct" and "assign" employees. *National Treasury Employees Union v. FLRA*, 691 F.2d 553, 564-65 (D.C. Cir. 1982). However, it is equally clear that "any employee may challenge an established performance standard in the context of a grievance proceeding conducted pursuant to the Act." *Id.* While the arbitrator may not modify the performance standard, for that right is reserved to management, he may determine whether the standard itself or its application violate applicable laws and regulations. *Newark Air Force Station and American Federation of Government Employees, Local 2221*, 30 F.L.R.A. 616, 637 (1987); *see also National Treasury Employees Union and U.S. Customs Service*, 32 F.L.R.A. 1141, 1148 (1988) (arbitral award of promotion did not violate agency right to determine organization where condition for promotion under regulations met).

as expense, "delay," or inconvenience to management do rights. As the D.C. Circuit has observed, "Congress has not established a collective bargaining system in which the duty to bargain exists only at the agency's convenience or desire. . . ." *American Federation of Government Employees v. FLRA*, 785 F.2d 333, 338 (D.C. Cir. 1986). "[I]f an employer was released from its duty to bargain whenever it had suffered economic hardship, the employer's duty to bargain would practically be non-existent in a large portion of cases." *Id.*

If Congress intended the management rights clause to serve as a shield against delay or inconvenience in the exercise of management rights, it would not have made those rights subject to negotiations concerning "procedures" and "appropriate arrangements," 5 U.S.C. §§ 7106 (b)(2), (3).[32] Further, it would have precluded arbitral review of *any* actions that implicate management rights, not just those actions described in Section 7121(c).

Thus, were this Court to give credence to the government's generic objections to arbitral review it would have to "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark v. Uebersee Finanz-Korporation*, 332 U.S. 480, 488 (1957). That result would be all the more improper in this case, in light of the specific statements of the chief

[32] In many instances, procedures and appropriate arrangements will delay the execution of management's rights. Nonetheless, Congress specifically rejected a provision that would have made a procedural proposal non-negotiable because of delay even where the delay the proposal engendered was "*unreasonable*" H.R. Rep. No. 1717, 95th Cong. 2d Sess. 158 (1978), *Legislative History* at 826; *see Department of Defense, Army Air-Force Exchange Service v. FLRA*, 659 F.2d at 1155-57. In addition, the D.C. Circuit has held that appropriate arrangements may directly interfere with management's exercise of its rights and are only nonnegotiable where the interference is "excessive." *American Federation of Government Employees, Local 2782 v. FLRA*, 702 F.2d at 1187-1188.

architect of the legislation, Rep. Udall, who expressly cautioned that management rights may not be used to override employees' rights to file grievances. See *supra* at 35.

In sum, IRS' assorted policy arguments against the use of grievance-arbitration in the context of the exercise of a management right are at war with decisions Congress made over ten years ago when it created a "virtually all inclusive" grievance procedure and invested arbitrators and the FLRA with the power to decide grievances that concern the violations of agency laws, rules, and regulations. This Court should reject IRS' attempt to use the management rights clause and broad unsupported statements regarding "effective and efficient" government to gut the dispute resolution mechanism Title VII established.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

5 U.S.C. §7103(a) provides in relevant part:

(9) "grievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

• • • •

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under chapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

5 U.S.C. 7106 provides in relevant part:

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. § 7117 provides in relevant part:

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

5 U.S.C. § 7121 provides in relevant part:

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including question of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective baragaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that —

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7432 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

APPENDIX B

Relevant Portions of the Supplement To OMB Circular A-76 Not Included In Petitioner's Appendix.

INTRODUCTION

Office of Management and Budget Circular No. A-76 (the Circular) establishes Federal policy regarding the operation of commercial activities. This Supplement implements the policy in the Circular by establishing procedures for determining whether commercial activities should be operated under contract with commercial sources or in-house using Government facilities and personnel. This Supplement is an integral part of the Circular, and compliance with all parts of the Supplement is mandatory.

This supplement is divided into four parts, with a table of contents at the beginning of each part:

Part I *Policy Implementation*—the general implementation instructions for the Circular. Included in this part are detailed flow charts and narrative descriptions, inventory and review requirements, and annual reporting requirements.

Part II *Writing and Administering Performance Work Statements*—sets forth the steps needed to develop, write and administer a performance work statement and a quality assurance plan for both in-house or contractor operation of a commercial activity.

Part III *Management Study Guide*—sets forth the recommended procedures for conducting the management review of the in-house organization.

Part IV *Cost Comparison Handbook*—provides detailed instructions for developing a comprehensive and valid comparison of the estimated cost to the Government of acquiring a product or service by contract and of providing it with in-house personnel and resources.

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PART IV—COST COMPARISON HANDBOOK

Chapter 1—General

A. PURPOSE

This revised Cost Comparison Handbook implements the policy and requirements of OMB Circular No. A-76. As prescribed in the Circular, the Handbook must be used by Federal agencies to ensure cost studies will be fair, reasonable and consistent. The Handbook provides detailed instructions for developing a comprehensive comparison of the estimated cost to the Government of acquiring a service by contract and of providing the service with in-house Government resources. The procedures set forth in this Handbook recognize the absence of a uniform accounting system throughout the Federal Government and are intended to establish a practical level of consistency and uniformity to assure all substantive factors are considered when making cost comparisons.

B. ORGANIZATION OF THE HANDBOOK

1. This Handbook is organized by the major subjects which must be considered when developing in-house and contract cost estimates. Generally, these subjects follow the line-by-line progression of the Cost Comparison Form (Illustration 1-1). Each line is explained in sufficient detail to include computations which must be made and documentation which must be retained to support the cost study.

2. Chapter 2 describes the procedures to develop the cost of Government performance of the function under study. Chapter 3 describes the procedures to develop the cost of contract performance of the function under study. Chapter 4 provides procedures for computing the minimum conversion differential and determining the cost comparison decision. Chapter 5 addresses the special requirements for expansions, new requirements, and conversions to in-house. Four appendices have been added to

support the cost comparison process and are identified in the Table of Contents.

C. OVERVIEW OF THE PROCESS

1. *General*

The completed cost study will provide reasonable estimates of the cost of alternative courses of action. To assure a fair and equitable comparison, in-house cost estimates must be based on the same scope of work provided in the performance work statement and include estimates of all significant and measurable costs.

2. *Procedure*

a. Preparation of the Performance Work Statement (PWS) is critical since it is the basis for the cost comparison. It must be sufficiently comprehensive to ensure that in-house or contract performance will satisfy Government requirements. The PWS should clearly state what is to be done without describing how it is to be done. The PWS should describe the output requirements of the in-house operation, including all responsibilities and the requirements for facilities, equipment and material. It should also provide performance standards and a quality assurance plan to ensure a comparable level of performance for either an in-house or contract operation.

b. Soon after the PWS is initially developed, the Task Group must complete a management study to determine the most efficient and effective organization for Government performance of the PWS. The current workforce, materials, equipment and facilities, and procedures will be analyzed and adjusted to appropriate levels. To be efficient, the activity workload must be accomplished with as few resources as possible. To be effective, an organization must be able to successfully accomplish the mission at the required standard of performance. The "Management Study Guide," Part II of this Supplement, is an example of an approach to the management study. The PWS and the results of the management study are then used to prepare the in-house estimate.

c. The in-house estimate must be based on the same PWS used in the contract solicitation. In addition, it must be developed on the premise that costs which would continue at the same level regardless of the method of performance (in-house or contract) will not be computed. When the PWS and resulting in-house cost estimate for an existing Government activity are based on any variation from current operations; e.g., scope of work, staffing, materials or equipment, such variations must be consistent with agency manpower and personnel regulations and must be coordinated with the agency's budget office. The step-by-step procedure for developing the in-house cost estimate is in Chapter 2 of this Handbook.

d. When the PWS has been completed, firm bids or proposals will be solicited in accordance with the acquisition strategy. Use of formal advertising with firm fixed price bids is preferred. However, proposals should be requested for competitive negotiations when this method would be more suitable and is warranted under current procurement regulations with fixed price incentive contracts preferred. It is essential that the invitation for bids or request for proposals provide for a common standard of performance that permits an equitable comparison of Government and contract costs for performing the same work.

e. After costs of in-house performance and costs of contract performance (other than costs dependent on contract price) have been estimated, the Cost Comparison Form (CCF) must be signed and dated by the person responsible for its preparation. If the study was prepared by a Task Group, the chairperson of the Task Group signs the CCF. At this stage, the contract price is still unknown.

f. The estimates of in-house and contract costs which can be computed prior to the cost comparison must be reviewed by a qualified activity, independent of the Task Group preparing the cost comparison study. This will be

done prior to submission of the CCF and supporting data (see Part I, Chapter 2, paragraph H) to the contracting officer. The purpose of the independent review is to ensure costs have been estimated and supported in accordance with provisions of the Circular and this Handbook. If no (or only minor) discrepancies are noted during this review, the reviewer indicates the discrepancies, signs, dates, and returns the CCF to the preparer. If significant discrepancies are noted during the review, the discrepancies will be reported to the preparer for recommended correction and resubmission. Following the independent review, the preparer submits to the contracting officer the CCF and supporting data in a sealed and identified envelope. This must be done by the required submission date for bids or proposals.

g. The confidentiality of all cost data, including the contract price, must be maintained to ensure that Government and contract cost figures are completely independent. For example, the contracting officer will not know the in-house cost estimate until the cost comparison is accomplished at bid opening date.

h. For advertised procurements, the following procedures apply:

1) At the time of public bid opening, the contracting officer and the preparer of the in-house cost estimate open the bids (as well as the Government in-house cost estimate) and enter the price of the apparent low bidder on the CCF. After the contract price is entered, the preparer completes the CCF. The contracting officer shall announce the results, subject to evaluation of bids for responsiveness, responsibility and resolution of possible appeals and protests. The completed CCF and supporting data shall be made available to affected parties for review at this time. The appeal period (see Part I, Chapter 2, paragraph I) begins at this time.

2) If, after the evaluation of bids and pre-award determinations of responsiveness and responsibility, the

selected bidder is other than the previously announced apparent low bidder, then the CCF will be revised. All affected parties will be notified of any such revision.

(3) The final decision for performance in-house or by contract shall be announced as required by agency procedures.

i. For negotiated procurements, use the procedures for advertised procurements, except as follows:

(1) After selection of the most advantageous proposal, the contracting officer and the preparer of the in-house cost estimate open the Government in-house cost estimate, complete the CCF and compare the alternative costs. The cost comparison must be made prior to the public announcement.

(2) If the cost comparison results in a tentative decision to convert to contract, the contracting officer notifies the contractor that an award will be made if the contracting alternative is still more economical than in-house performance after completion of the public review period, plus any additional time required pursuant to the special procedures. If necessary, the contractor must extend the proposal acceptance period 60 days to cover the appeal period. The contracting officer publically announces the apparent results of the cost comparison for the information of all directly affected parties. This public announcement includes a notice that formal supporting documentation (see Part I, Chapter 2, Paragraph I) is available for review by directly affected parties.

(3) Affected parties must also be informed that performance by contractor or by in-house personnel is contingent upon completion of the review period, plus any additional time required pursuant to the appeal procedures.

ILLUSTRATION 1-1

Agency _____ Location _____ Function _____

COST COMPARISON FORM
In-House vs. Contract Performance
Performance Periods

In-House Performance Costs	1st	2nd	3rd	Add'l	Total	Reference
1. Personnel Cost						
2. Material & Supply Cost						
3. Other Specifically Attributable Costs						
4. Overhead Cost						
5. Additional Costs						
6. Total In-house Costs	___	___	___	___	___	
Contract Performance Costs						
7. Contract Price						
8. Contract Administration						
9. Additional Costs						
10. One-time Conversion Costs						
11. Gain or Loss on Disposal/ Transfer of Assets						
12. Federal Income Tax (Deduct)	( )	( )	( )	( )	( )	
13. Total Contract Costs	___	___	___	___	___	
Decision						
14. Conversion Differential					___	
15. Total (Line 13 & 14)					___	
16. Cost Comparison (Line 15 minus Line 6)					___	

Do the cost comparison calculation only for the total column.
Positive result on Line 16 supports decision to accomplish function in-house.

17. Cost Comparison Decision (check block) / / Accomplish In-House
/ / Accomplish by Contract

	Name/Title/Organization	Signature	Date
In-House Estimate Prepared By:	_____	_____	___
In-House Estimate Reviewed By:	_____	_____	___
Cost Comparison Accomplished By:	_____	_____	___
Cost Comparison Reviewed By:	_____	___ ___	___
Cost Comparison Decision Approved By:	_____	_____	___